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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778 and 779

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO CONSOLIDATE AND TO ADVANCE FOR IMMEDIATE ARGUMENT ON THE BRIEFS BELOW AND STATEMENT OF ADDITIONAL QUESTION PRESENTED IN NO. 778

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Erie-Lackawanna Railroad Company (EL) hereby moves (1) to consolidate the appeal of the Norfolk & Western Railway Company (N&W) in *Norfolk & Western R.* v. *United States*, No. 779, with the appeal of the Baltimore & Ohio Railway Company, The Chesapeake and Ohio Railway Company, N&W, and Western Maryland Railway

Company in *Baltimore & Ohio R. R.* v. *United States,* No. 778; the appeals of the Boston and Maine Corporation (B&M) and John Hancock Mutual Life Insurance Company *et al.* in *The Delaware and Hudson R. R.* v. *United States,* Nos. and ; the appeal of City of Scranton and Milton Shapp in *Erie-Lackawanna R. R.* v. *United States,* No. ; the appeal of Oscar Gruss & Son (Gruss) and the New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee (NH Bondholders) in *Oscar Gruss & Son* v. *United States,* No. ;* and any other appeals taken from the October 19, 1967, decision of the three-judge district court in *Erie-Lackawanna R. R.* v. *United States* (S. D. N. Y., 66 Civ. 2860 and related cases), and (2) to advance that consolidated case for immediate argument on the briefs below, the jurisdictional papers, and any briefs in response thereto filed by appellees prior to argument, pursuant to the suggestion by appellants in their joint Motion to Advance in Nos. 778 and 779, at 4-6. As grounds for said motion, EL respectfully states as follows:

1. Consolidation is warranted for the following reasons:

(a) Appellants have brought six separate appeals from a single, unanimous decision of a statutory three-judge district court which (1) upheld the decision of the Interstate Commerce Commission (the Commission) in Finance Docket No. 21510, see 330 I. C. C. 780 and 331 I. C. C. 22, directing the N&W to include EL, The Delaware and Hudson Railroad Corporation (D&H) and B&M on specified terms (the *Inclusion* case), and (2) upheld the Com-

*As of this writing, jurisdictional statements have been filed in Nos. 778 and 779 only, although notices of appeal have been filed in the other actions listed and applications for a stay have been filed by appellants Gruss and NH Bondholders.

mission's decision in Finance Docket Nos. 21989 and 21990 (the *Merger* case), see 327 I. C. C. 475, 328 I. C. C. 304 and 330 I. C. C. 328, authorizing the merger of the Pennsylvania Railroad Company and The New York Central Railroad Company into a single system (Penn-Central). The district court recognized the fundamental intertwining of the issues in the two proceedings and, without formally consolidating the various actions brought to review those Commission orders, disposed of all the actions in a single opinion and judgment.

(b) The jurisdictional papers in Nos. 778 and 779 demonstrate that the two matters are so interrelated that they can only properly be disposed of together. Thus, in No. 779, N&W makes essentially one argument, that particularly in light of the impact of Penn-Central upon EL, D&H and B&M, N&W should not be required to include those three roads at the price set by the Commission. Similarly, appellants in No. 778 argue essentially that the Appendix G conditions imposed by the Commission upon Penn-Central for temporary protection of EL, D&H and B&M until they can be included in N&W, are somehow improper or unlawful.

(c) This Court itself recognized the interrelation of the two Commission proceedings now sought to be reviewed, when in *Baltimore & Ohio R. R.* v. *United States,* 386 U. S. 372, 378, it reversed an earlier decision of the district court approving the Penn-Central merger, on the ground that "the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads". The "ultimate fate" of EL, D&H and B&M (the "protected roads") is dependent upon the outcome of the appeals here sought to be consolidated.

2. Immediate argument is warranted for the following reasons:

(a) Preliminarily we note that the issues thus far raised by appellants are so patently unsubstantial as to warrant affirmance without further argument. Appellants' arguments, indicated in the jurisdictional statements filed thus far, have no general significance, and have been made to and considered and rejected by both the Commission and the court below.

(b) Thus, N&W's Jurisdictional Statement in No. 779, the *Inclusion* case, stripped of its surplusage, merely urges that the Commission's decision requires N&W to pay too high a price for EL, D&H and B&M. Obviously that issue has been fully and even elaborately canvassed by the Commission and the court below. N&W asks this Court simply to substitute its judgment for that of the Commission or to do that which the court below refused to do: "engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." Jurisdictional Statement in No. 779, at B-69.

(c) Appellants in No. 778, the *Merger* case, present five questions, each of which has significance only if this Court reverses the district court's decision in the *Inclusion* case. Appellants' only real argument is that the provisions of Appendix G to the Commission's report of June 9, 1967, 330 I. C. C. 328, which provide interim protection for EL, D&H and B&M prior to their inclusion in a major system, are unlawful.

(d) By reason of the foregoing, EL submits that the decision of the court below could properly be affirmed in all respects without further argument. However, because of the size and impact of the *Merger* and *Inclusion* cases, the

number of parties and issues and because of the time necessarily involved in motions to affirm, stay applications, etc., EL makes this motion in an effort to cut through some of the time-consuming procedural aspects and reach the merits.

(e) EL agrees with the Motion to Advance filed by appellants in Nos. 778 and 779 that the public interest requires that the appeals be expedited. This Court has itself recognized that in its previous consideration of the Penn-Central merger, where it noted, referring specifically to the *Inclusion* case, "If its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made." 386 U. S. at 392. The court below entered a stay of the consumation of the Penn-Central merger only for 15 days, or until the determination of any application to this Court for a stay. The court noted that the *Merger* case would be an appropriate case for a stay pending appeal, were it not for the critical situation of the bankrupt New York, New Haven & Hartford Railroad Company (NH). EL is unwilling, as the court below was, "to take responsibility for such devastating hardship as even the temporary cessation of NH operations would bring to New England and New York and to a lesser degree to other sections of the country". Jurisdictional Statement B-70. Therefore, rather than immediately joining in the application for a stay filed by appellants in No. 778, EL has instead requested the consolidation, immediate argument and expeditious disposition of these appeals.

(f) If the relief requested by EL in this motion is not granted, it will be forced to join in the application for a stay of the Penn-Central merger. The Commission has recognized that "it is doubtful that, without inclusion in a major

system these three carriers [EL, D&H and B&M] could withstand the competition of the applicants merged [Penn-Central]". 327 I. C. C. at 532. Moreover, this Court itself has held that "it is necessary that the decision as to the future of the protected roads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger". 386 U. S. at 390. The Commission has determined that the three roads should be included in the N&W system and has provided interim protection to the three roads through the Appendix G conditions. However, both the determination in the *Inclusion* case and the imposition of the protective conditions in the *Merger* case have now been attacked in this Court. Should the inclusion order be reversed and the protective conditions struck down by this Court while the Penn-Central Merger is allowed to be consummated, EL would be placed in the intolerable position of facing alone the full impact of competition with the largest railroad merger in our history. Under such circumstances, as the Commission has found, it is doubtful that EL could survive.

3. Argument on the briefs below, the jurisdictional statements and any replies thereto filed before argument is warranted for the following reasons:

(a) Both the *Inclusion* case and the *Merger* case have been exhaustively and repeatedly briefed by all parties. The briefs to the court below were the successors to exhaustive briefs filed with the hearing officer and the Commission.

(b) N&W's jurisdictional statements and the offer to argue on the briefs below in its motion to advance make clear that appellants simply intend to repeat to this Court their arguments below. Thus, further briefing will not aid the Court in resolution of the merits.

(c) The decision of the court below is thorough and comprehensive, carefully setting forth and resolving the contentions of the parties.

4. Solely because of N&W's appeal in the *Inclusion* case, EL supports the appeal from the decision in the *Merger* case and, pursuant to Rule 10 of the Rules of the Supreme Court, asserts that a further question is presented in the *Merger* case (No. 778):

> Whether the district court erred in not requiring the commission to reserve jurisdiction to provide for a capital loss indemnity of EL by Penn-Central in the event that judicial review of the *Inclusion* case produces a downward revision of the terms for inclusion of EL in the N&W system because of the traffic consequences of the Penn-Central merger.

That question is a substantial one, as demonstrated by D&H's discussion of that issue in its Motion to Consolidate, etc., and EL hereby adopts D&H's discussion of that issue.

WHEREFORE, EL respectfully requests that the appeals in the *Inclusion* and *Merger* cases be consolidated and set down for immediate argument on the briefs below, the jurisdictional papers and briefs of appellees in response to the

jurisdictional papers, to be filed no later than one day before the date for oral argument.

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Respectfully submitted,

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